United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Benson Lumber Company, a corporation,

Plaintiff in Error,

vs.

H. C. McCann, by Jesse F. McCann, his Guardian ad Litem,

Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT.

After this cause had been orally argued a stipulation was filed and an order entered thereon giving defendant in error until November 3rd and plaintiff in error until December 3rd, 1914, in which to serve and file supplemental briefs. Defendant in error served his brief in due time, but not upon counsel having the matter in charge, and through an inadvertence it was not called to his attention. This brief was prepared upon the assumption that defendant in error had abandoned his intention of citing additional authorities or

advancing further argument. After this brief was set in type the supplemental brief of defendant in error was called to the attention of counsel. Considering all the circumstances, including the desire of both parties for a speedy decision, it seems best to us to present the brief as prepared, noticing first the authorities relied upon in the original brief of defendant in error, then the decisions cited in his supplemental brief. After all this is perhaps the logical course.

We have not examined the numerous decisions cited to the effect that a master must exercise reasonable care to furnish to his servants a safe place in which to work; that he cannot delegate this duty; that where a defendant is negligent it is no defense that the negligence of a third person also contributed to the plaintiff's injuries. We do not challenge any of these well settled rules.

As we read his brief there is no reply to our claim that if defendant in error did not fully appreciate the danger of the work, his lack of appreciation of his peril was due entirely to his want of any care and prudence, to his blindly closing his eyes to obvious danger and that he was therefore guilty of contributory negligence. Hence we will leave that issue to the discussion on pages 45 to 46 and 73 of our opening brief, confining ourselves entirely to the decisions cited upon the issue of assumed risk.

I.

Authorities Cited in Original Brief of Defendant in Error.

It will be recalled that the defendant in error was injured while attempting to step from the carrying table to the push table, over a revolving dog roller. He knew of the location of both the roller and the "X" board, and that the former was in motion, and had stepped over them many times before.

At the oral argument learned counsel for defendant in error frankly admitted that the defendant in error, when he attempted to go from his platform to the push table, assumed the risk of having his foot struck by the dog roller; assumed the risk of being struck and injured by the lumber which was moving rapidly upon the tables; assumed every risk incident to his perilous attempt except the one which produced the injury, viz., getting his foot caught between the "X" board and the roller; because the "X" board was unnecessary to the operation of the machinery and its presence was therefore an added danger, due to the negligence of the employer; that an employee never assumed the risk of the negligence of the employer. Indeed, defendant in error placed his entire defense of the judgment upon this single proposition, regardless of whether the danger arising from the master's negligence was so open and obvious that the servant must necessarily have fully understood and appreciated the same. Neither reason, nor the decisions relied on by him, sustain his contention.

At first blush, some of the quotations in his brief seem to lend him support, but an examination of the decisions not only discloses that they do not support the contention, but hold the exact contrary. It is the single purpose of this brief to demonstrate this by an analysis of those authorities.

Before discussing the cases, we beg leave briefly to point out the illogic of the position of defendant in error. If his contention were sound, the defense of assumed risk would be useless, for, wherever the risk was the result of the negligence of the employer, then the servant would not assume it. If there was no negligence on the employer's part, the servant could not recover, regardless of whether he did or did not assume the risk.

In our opening brief we cited many decisions to the effect that the servant assumes all risks of which he knows or should know by the exercise of ordinary care. Defendant in error has cited many decisions holding that it is not correct to say that an employee assumes risks which he should know by the exercise of ordinary care, that he is not required to inspect the master's premises to ascertain if they are safe. These decisions are not in conflict, each announce the same rule in different terms. Broadly speaking, the servant, in the first instance, may rely upon the assumption that the master has discharged his duty to furnish a safe place in which to work. The servant is not required to anticipate or search for latent or hidden defects. On the other hand, he assumes not only the risks which are openly and

obviously incident to his employment, but all risks which arise from any defect caused by the master's negligence, where such defect and the danger incident thereto are known to the servant or so patent that he must be presumed to know of them. He can not wilfully close his eyes to dangers which are plainly before him and which he would discover and know of if he exercised ordinary care in doing his work. These rules are recognized and enforced alike by the decisions which we have cited and those relied upon by defendant in error.

We will examine first the federal decisions, and then those cited from the state courts. (The italics throughout are our own.)

> Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, 191 U. S. 64, 68, 48 L. Ed. 97, 100 (cited by defendant in error on page 43 of his brief).

Deceased, a brakeman on defendant's train, on a dark night was killed while riding on a furniture car which was higher than the average car upon the road. He was struck by a spout to water tank which was negligently constructed so as to project across the track in such a manner as to strike any one riding on a car. If properly constructed it would not have so projected. The deceased had been over that portion of the road only a few trips, and that after dark.

The court held that the evidence did not irresistibly force the conclusion that the deceased either knew or must have known of the spout or of its negligent con-

struction and therefore could not as a matter of law be held to have assumed the risk of his injury, saying (the first portion of the quotation is printed by defendant in error):

"The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. *This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and, in such case, cannot recover.*"

Hawley v. C. B. & Q. Ry. Co., 133 Fed. 150, is similar in all respects to the case of Choctaw, Oklahoma etc. Co. v. McDade, *supra*.

Great weight is placed by defendant in error upon Bunker Hill etc. v. Jones (9th Circuit), 130 Fed 813, 819,

because it is a decision by this court.

On page 48, a portion of the decision is quoted to the effect that a servant may rely upon the master to perform his part of the contract, viz., to use ordinary care to furnish the servant a safe place in which to work. An examination of the decision shows that the court did not attempt to lay down any different rule from that announced in the McDade case, or the decisions cited in our opening brief. The plaintiff was a minor, working in the stope of a mine. He was severely injured by the fall of rock. The principal dispute was from what point the rock fell. The plaintiff there claiming that the rock fell from the ceiling overhead due to insufficient timbering. The defendant that it fell from the side of the wall, and was caused to so fall by the negligent way in which the plaintiff was doing his work. The jury having decided the disputed issues of fact in favor of the plaintiff, this court refused to hold that the plaintiff, as a matter of law, assumed the risk of his employment, saying in part:

"It does not appear from the evidence that the defendant in error could have discovered that the roof of the stope was in danger of caving, without a particular inspection thereof, or that the timbering was insufficient to secure the loose rock above. It was not his duty to timber the mine, or to pay any attention to that work, *unless it was obviously defective, in his understanding, in the immediate vicinity of his work.*

That duty belonged exclusively to the defendant, and the question whether or not it exercised reasonable care in its fulfillment was properly submitted to the jury."

In

Texas Pacific Ry. Co. v. Archibald, 170 U. S. 665, 42 L. Ed. 1188 (cited by defendant in error on page 47 of his brief),

plaintiff was injured through the breaking of a rod due to a defect therein while coupling cars. The defect could have been discovered by a reasonable inspection by defendant. It was not a patent or obvious defect and would have required investigation on the part of the plaintiff to have discovered the hazard. The Supreme Court held that an employee is not compelled to make investigations or pass judgment on his employer's methods of doing business and has a right to assume that reasonable care will be exercised to make appliances safe; but this rule is subject to the exception that if in an appliance there exists a defect *known to the employee or plainly observable by him, he cannot recover for an injury caused by such defect,* if with knowledge he negligently continues to use the defective appliance. In this case the Supreme Court expressly holds that the law does not relieve the employee from observing patent defects in appliances with which he is working.

San Francisco etc. Co. v. Carlson, 161 Fed. 581, 584 (cited on page 48 of the brief of the defendant in error).

This case does not seem at all in point, and apparently has no bearing on the case whatever. We do not know why it is cited.

Hough v. R. R. Co., 100 U. S. 213, 217 (cited in brief of defendant in error on page 45),

Does not deal with the assumption of risk or defective places of work or appliances, but with the defense of fellowship of servants. The action was for the death of plaintiff's decedent, an engineer. It was held that the master mechanic and the men under him were not fellow-servants of a locomotive engineer.

The defendant in error, on pages 45 and 46 of his brief, prints the following quotation from

C. M. & S. P. R. R. Co. v. Ross, 112 U. S. 377, 383:

"But however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption he must not himself be guilty of contributory negligence."

The above quotation would apparently support the contention of the defendant in error, but the court was not there speaking of assumed risk, but was again treating on the defense of negligence of fellow-

servants, and it has always been the law that, unlike contributory negligence, the concurring negligence of a fellow-servant does not bar a recovery where the master personally has been negligent.

Kreigh v. Westinghouse, 214 U. S. 249 (cited by defendant in error on page 43 of his brief).

Plaintiff, a bricklayer, was injured by reason of a derrick being negligently equipped with one rope instead of three. He did not know this and from where he worked could not see the ropes on the derrick.

We come now to the California decisions relied on by defendant in error.

Bone v. Ophir Mining Company, 149 Cal. 293, 294 (cited on page 34 of the brief of defendant in error);

Baxter v. Roberts, 44 Cal. 187, 192 (cited on page 42 of the brief of defendant in error);

Merrifield v. Maryland Company, 143 Cal. 54 (cited on page 50 of the brief of defendant in error),

involve dangers that were unknown to the respective plaintiffs. In each case the cause of the personal injury was not open and obvious and could have been discovered by the person injured only upon investigation. In Merrifield v. Maryland, the question of assumed risk does not appear to have been advanced or considered. These decisions are, therefore, without weight or value in determining any issue in the case at bar.

Schellin v. No. Alaska Salmon Co., 47 Cal. Dec. 138, 140, 138 Pac. 723, 735 (cited on pages 42 and 43 of the brief of defendant in error), is greatly relied on by defendant in error, and is an extremely interesting decision because of the fact that it was decided long after the amendment of 1907, and because of the further fact that the Supreme Court of California announced the rule as we have heretofore claimed it to be, viz., that the servant is not required to seek or hunt for latent danger which he has no reason to suspect, but that where the danger or defect is obvious he assumes the risk thereof. The facts were that plaintiff had been hired to go to Alaska to work in a cannery; when plaintiff entered the employment of the defendant he was unfamiliar with machinery, but knew he would have to run a gasoline engine; before he was put to work running the engine he was instructed in its operation and also in putting on a belt upon a pulley while the machinery was in motion. The machinery had all been constructed before plaintiff went to work. While plaintiff was running the engine he noticed the belt was off the pulley, and, ascending the running board, attempted to adjust the belt upon the pulley. His clothing was caught by a set screw which projected about ¾ of an inch from the collar upon the shafting. Plaintiff had never seen this set screw; did not know that it was upon the collar. The evidence showed that it could not be seen when the machinery was in motion. The set screw performed no function whatever upon the ma-

chinery and was utterly useless. The court held the question of his assumption of risk was for the jury.

The court said, as quoted in plaintiff's brief:

"The collar and set screw performed no functions. Their presence at that place made it one of great danger to plaintiff, and it was defendant's duty to make and to maintain there as safe a place as reasonably was possible."

Adding:

"The shafting had been erected before plaintiff was put to work. *Of course, if there had been a danger so obvious that plaintiff must have seen it, and assumed the risk of working in proximity to it, he could not recover.* * * *

"If plaintiff was, as he testified, ignorant of the existence of the set screw, he was under no obligation to investigate. Majors v. Connor, 162 Cal. 135, 121 Pac. 371. The rule of assumption of risk by an employe does not apply *where the danger is not obvious, where it is unknown to the employe, and where by the exercise of ordinary care the employer could have discovered and removed it.*"

But we submit that the rule does apply to the case at bar, for here the defect and the danger was open, obvious and apparent, and fully known to defendant in error. There is no claim that he did not know of the existence of the dog roller or of the "X" board. On the contrary, he stated many times that he knew of their presence; knew the roller was shod with iron spikes, and made one hundred to one hundred and fifty revolutions a minute. He constantly saw it forcing

heavy lumber from the table; knew that if his foot came in contact with it, injury would result. Counsel at the oral argument conceded that defendant in error assumed the risk of injury from having his foot struck by the roller, but contended that he did not assume the equally apparent danger of having his foot caught between the roller and the "X" board. We think it preposterous to say that he had sufficient comprehension to appreciate the danger of having his foot struck by the roller, and yet did not appreciate that the roller would also injure his foot if he got it caught between the roller and a board which he knew was within an inch of the roller. Under the most liberal interpretation of the rules announced by the decisions which he cites, he must be held to have assumed the risk of his unfortunate injury.

Jacobson v. Oakland Meat etc. Co., 161 Cal. 430.

Plaintiff, while working in an ill-lighted room where it was difficult to see, was injured because guards to certain gears had been removed. It was fairly debatable whether the plaintiff knew of the absence of the guards. The obvious distinction between that case and the one at bar is pointed out in

Bresette v. E. B. & A. L. Stone Co., 162 Cal. 74, 78,

which is quoted from at length in our opening brief and which, we submit, has not been distinguished from the case at bar.

On page 44 of the brief of defendant in error, is a very deceptive quotation, due to a printer's mistake. Without proper spacing, an excerpt from

Skelton v. Pac. Lumber Co., 140 Cal. 507, 510,

is run with an excerpt from Nash v. Dowling, erroneously cited "North" v. Dowling, 93 Mo. App. 156.

Skelton v. Pac. Lumber Company does not involve the question of assumed risk. The action was for the death of plaintiff's intestate, occasioned by the bursting of an emery wheel which was caused to be run at a too high rate of speed by the superintendent of the factory. The only question which was discussed in the case was as to whether such superintendent was a fellow servant or vice-principal of the deceased. In discussing this matter, the court said, as shown by the quotation in the brief of the defendant in error:

"A servant, of course, takes upon himself all the ordinary risks and perils of accident in the common course of the service in which he is engaged."

Immediately following the quotation, and without proper space, is a quotation from

Nash v. Dowling, *supra*, 93 Mo. App. 156,

to the effect that if the master's negligence aggravates the danger, the servant does not assume the risk of his injury.

But the Missouri court was there dealing with a case where a servant had been furnished a defective appliance; had complained of that defect to the employer; and the employer had urged him to keep on with his work, promising that the defect should be repaired. While it is perhaps inaccurate to say, as the

Missouri court did, that where the master's negligence aggravates the danger, the servant does not assume the risk, still it is a universal rule of law that, where an employe complains of a defect, and the master requests him to continue in the employment, promising to repair it, that, for a reasonable time within which the defect might be repaired, the servant does not assume the risk.

The Supreme Court of California points out the logical reason for this rule to be that where the servant knows of the defect and complains of it, and the employer allows the employee to continue work, assuring him that the defect will be repaired, the employer thereby agrees for a reasonable time to assume the risk of the servant being injured by the defect. See:

Anderson v. Seropian, 147 Cal. 201, 208, 209.

In that case the court, in part, said:

"The general rule undoubtedly is, that one who remains in the service of his employer after notice of a defect in the machine he is operating which increases the danger to which he is exposed, assumes the risk which the defect increases.

"But there is a marked distinction in law between a case where the employee knows when he contracts to operate a machine, that it is defective, or a defect is subsequently disclosed in its operation, to which he does not call the attention of his employer, but continues to operate it in its defective condition, and a case where the machine, when he takes charge of it, is in good condition, but a defect subsequently arises

which is called to the attention of the employer, and the employee continues to operate it under a promise that the defect will be remedied." (P. 208.)

It is readily observed that the case of Nash v. Dowling, *supra*, has no bearing on the one at bar, for here there not only is no suggestion by the defendant in error that he ever objected to the structure, or to the uncovered dog roller, or the "X" board, but, on the contrary, it affirmatively appeared that he did not make any complaint.

"I had one order, that was to get up and get that board out. Mr. Keltie, the foreman, he came and gave me that order; that was before that accident. That was the only order I ever had about it. Mr. Keltie was our foreman. I never spoke to him or asked him if there was any way of getting up except over this dog roller. *I never made any complaint to anybody about it.*"

[Trans. of Rec., pp. 114-115.]

This brings us to the decisions of courts of sister states. As this brief was originally prepared, the facts of all these decisions were set forth and commented on. The space necessary, however, to note the California and federal decisions cited in the supplemental brief of defendant in error, is such that we feel that we would not be justified in discussing each of these authorities. Nor could any useful purpose be subserved thereby. The accident occurred in the state of California; and was tried in the federal courts. If the decisions of other states announced any different

rule from that established by the Supreme Court of California and the federal courts, they could not, of course, control this case. They do not, however, promulgate a different rule. We have examined each and all of them, and without exception, wherever a recovery had been allowed, the servant was injured through some concealed or latent defect of which he did not know.

To sustain his contention that the employee does not assume the risk of the master's negligence, defendant in error, on page 47 of his brief, quotes from the decision of the Supreme Court of Massachusetts in 168 Mass. 408, 47 N. E. 111-112, to the effect that the servant assumes all ordinary risk incidental to his business. That case can be of little comfort, for there it was held that where a servant was informed that the employer in a certain room was burning a patent fuel, and that the defendant did not know whether it emitted dangerous gases or not,—the servant assumed the risk of being asphyxiated by the escape of nauseous gases from the stove.

In

Nadeau v. White Lumber Co., 76 Wis. 120, 43 N. W. 1135,

the court, in addition to the quotation appearing on pages 44-45 of the brief of defendant in error, said:

"The employee, when accepting an employment, assumes all the risks that are reasonably incident to such employment, and no other, *unless the unusual and unreasonable risks of such employment are open and visible, and known to and comprehended by the em-*

ployee; and in such case, he assumes all the risks so known to him, whatever they may be."

We believe the foregoing are all of the authorities cited by the defendant in error on the question of assumption of risk. It is apparent that they do not sustain his contention.

As we have heretofore attempted to show, both in our brief and oral argument, the "X" board was undoubtedly placed before the roller to prevent the clothes of employees from being caught in its teeth. But if we are in error, and the board served no useful purpose and was there as the result of the positive negligence of the employer, still the danger incident to its position near the roller was a danger not only which defendant in error could have seen, but one which he actually did see. Under these circumstances, all of the authorities, those cited by the defendant in error, as well as those relied on by us, deny his right to recover.

In our original brief, pages 48 to 65, we called the court's attention to many decisions both of the federal and state courts, where minors, much younger in years than the defendant in error, and greatly lacking his knowledge of and experience with machinery, were held to have assumed the risks of their injury, where the same were as apparent and open, as in the case at bar.

No attempt has been made by the defendant in error to break the force of the many well considered authorities cited by us, or distinguish them from the case at bar other than by his oft repeated assertion that an

employee does not assume the risks of the master's negligence. The foregoing review of his authorities shows, not only that they do not support this contention, but that the learning and industry of his counsel have been unable to find a single decision where, under facts similar to the case at bar, recovery has been allowed. We feel that we might, with perfect safety, consent that the numerous decisions cited by us, applying the settled rules of law to facts similar to those in the case at bar, be entirely disregarded, and the cause submitted alone upon the authorities cited by the defendant in error. While most of those decisions, under the facts then before the court, allowed a recovery, still, each and all of them, with a surprising uniformity, lay down the rule that the employee assumes not only all risks incident to his business, but all risks arising from the negligence of the master, where the defect and danger incident thereto is either known to the employee, or is open, obvious and apparent. Applying this rule to the case at bar, we think it is perfectly clear that the judgment cannot be maintained. Had the "X" board been concealed from the defendant in error, so that his foot was caught between the dog roller and an obstruction of which he did not know, a different case would be presented, but, as we have repeatedly pointed out, the "X" board was in his plain sight. He not only could have seen it, but actually did see it and actually knew that the roller was revolving within an inch of the board. When he undertook to go upon the push table he intended to step clear of both the board and the roller. His in-

jury was caused, not by a failure to comprehend the danger of getting his foot caught between the roller and the board, but by failing, for some reason, to carry out his intention of stepping over both of them.

As heretofore remarked, learned counsel for the defendant in error tacitly concedes in his brief, and, at the oral argument, frankly admitted, that when the defendant in error undertook to go upon the push table he assumed all of the risks of being injured by the movement of the endless chains in the carrying table, of being struck by the lumber upon either table, of being struck and injured by the revolving dog roller, but claimed that he did not assume the risk of getting his foot caught between the board and the roller; not because the same was not open and apparent to him, but because such danger was one due to the negligence of the master and therefore not assumed. As we have seen, the authorities which he cites do not support this proposition, but hold the exact contrary. It is absurd to say that the defendant in error had observation, discretion and experience sufficient to appreciate the danger of being struck by the moving timber, of being injured by the revolving bands of steel, or by the dog roller itself, and yet did not have discretion or observation sufficient to comprehend the obvious danger of getting his foot caught between the board and the roller.

II.

Authorities Cited in Supplemental Brief of Defendant in Error.

In his supplemental brief, defendant in error cites but one case to support his original contention that an employee does not assume the dangers arising from the master's negligence when he knows of the same, viz.,

> Seaboard Air Line Railway v. Horton, 233 U. S. 492, U. S. Adv. Opinions (1913), 635, 640.

While we believe it is apparent from the quotation set forth by defendant in error that the decision does not sustain his contention, an examination of the cause shows that it holds the exact contrary.

The cause came to the federal Supreme Court on writ of error to the Supreme Court of North Carolina. The plaintiff, an experienced engineer, had sued the defendant to recover damages for personal injuries resulting from an explosion which he claimed to have been caused by the absence of a guard glass in the engine. The plaintiff claimed that when the engine was delivered to him on July 27th, the guard glass was absent; that he made complaint to the foreman of the roundhouse, who requested him to continue using the engine, promising him to see that new guard glass was placed in the engine as soon as possible. The de-

fendant claimed, and its evidence tended to show, that when the engine was delivered to the plaintiff the guard glass was in the engine, in good condition, but that plaintiff had negligently allowed it to become dirty and smoky and that shortly before the accident, the fireman, in plaintiff's presence, had removed the glass to clean it, plaintiff continuing to use his engine without the glass until the explosion occurred. The statutes of North Carolina as they existed at the time of the accident, provided that when an injury was the result of a master's negligence, the servant did not assume the risk thereof. The Federal Employers' Liability Act left in full force the common law rule of assumed risk, except where the accident was due to the failure of the master to comply with a federal statute. Plaintiff and defendant, at the time of the accident, were engaged in interstate commerce. The trial court proceeded upon the theory that the state law, as to assumed risk, and not the federal liability statute governed. The Supreme Court of North Carolina having sustained the trial court, writ of error was sued out and the cause taken to the Supreme Court of the United States. The judgment was there reversed, it being held that the federal law governed and that since no federal statute required the guard glass, the common law rule of assumed risk was in effect, the court saying (the first paragraph is quoted by the defendant in error):

"But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, *unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court.* (Citing authorities.)

"When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty." (P. 640.)

At the trial, the defendant requested the court to give the jury the following instruction:

"If you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then

the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes.'" (P. 640.)

It was held that it was reversible error to refuse the instruction as requested, the court saying in part:

"By the instruction as given, the application of the rule of assumed risk was confined to the single hypothesis that the jury should find the guard glass was in position when the engine was delivered to plaintiff on the morning of July 27th. This, as already pointed out, was one of the questions in dispute; plaintiff having testified that the guard glass was missing at that time, while his fireman testified (and in this was corroborated by circumstantial evidence) that it was in place at that time, and was subsequently broken. But by the common law, with respect to the assumption by the employee of the risk of injuries attributable to defects due to the employer's negligence, when known and appreciated by the employee, and not made the subject of objection or complaint by him, it is quite immaterial whether the defect existed when the appliance was first placed in his charge, or subsequently arose. Hence, if the guard glass was missing when plaintiff first took the engine, as he testified, and he, knowing of its absence and the consequent risk to himself, continued to use the water guage without giving notice of the defect to the defendant or its representatives, he assumed the risk.

"Defendant was entitled to have the requested instruction given respecting assumption of risk, and as the charge actually given did not cover the same ground, there was error." (P. 641.)

We would be entirely willing to submit this cause upon the rules announced in the above decision of the federal Supreme Court, which is its latest expression on this subject.

Indeed, as we read the supplemental brief of the defendant in error, which was written after the oral argument of this cause, and the discussion there of the authorities cited, it seems to us that the defendant in error attempts to shift his defense of the judgment from that originally taken, viz., that the servant does not assume the risk of the master's negligence, to the contention that the case was properly submitted to the jury, because a servant who, through youth or inexperience, is unable to appreciate the danger of a known defect, does not assume the risk thereof. Many decisions on this point are cited. The rule announced by these numerous authorities is, of course, founded in reason and justice. We cannot see its application to the present case. While the ability of learned counsel has been able to cite a multitude of cases it has not produced a decision applying that rule to a case where the facts were similar to the one at bar, nor has it enabled him to point to a scintilla of evidence tending to show that the defendant in error, because of his

youth or inexperience, did not fully appreciate the danger of the dog roller or of the "X" board. He was not, as in most of the cases cited, suddenly removed from one branch of industry to be required to work in another. He was injured while at his regular employment. He was interested in mechanics and had made a study of the machinery in the mill. There was absolutely nothing about either the "X" board or the dog roller which was not known to him; there was no unusual motion of the roller which caused or produced his injury.

However, without further comment, we will notice the numerous federal and California decisions cited.

It is first suggested that the common law rule of assumed risk is inhuman and should be modified by the courts, defendant in error citing

> Schlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1, 11-12.

The court there, however, was dealing with a statutory modification of the rule of assumed risk. We have not, and do not propose to enter into any discussion of the merit of the law of assumed risk for the reason that unquestionably it was in existence at the time of this accident by the positive declaration of the statute. We assume that the court intends to enforce the law as it existed at the time of the accident, leaving the question of the advisability of changes for the

legislature, and that the question is not one of the advisability of the law but of the application of the law to the undisputed evidence set forth in the record.

> Texas & P. R. Co. v. Harvey, 228 U. S. 319, 321-322 (cited on page 7 of the supplemental brief of defendant in error),

Arose in Texas and the statute there provided that in an action for injury or death, it should not be held that the servant assumed the risk of a master's negligence where a person in the exercise of ordinary care would have continued in the employment of the master with knowledge of the defective machinery or structures. The statute further relieved the employee from any duty of complaining of the defects of which he knew. The deceased, an assistant hostler in the roundhouse, was killed while riding on an engine, by coming in contact with posts negligently set too near the track. The Supreme Court of the United States, in pointing out the radical change wrought by the statute, said:

"At the common law a servant assumes the ordinary risks of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty.

This rule is subject to the exception that, where a defect is known to the employee or is so patent as to be readily observed by him, he cannot continue to use the defective appliance, in the face of knowledge and without objection, without himself assuming the hazard incident to such a situation. If a defect is so plainly observable that the servant may be presumed to know its existence and he continues in the master's employment without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot recover."

Applying the rule announced by the above decision to the conceded facts in this case, it is evident that a verdict in favor of the defendant in error cannot be sustained.

Defendant in error invites a careful consideration of the above decision in reference to the construction to be placed on the amendment of 1907. The Texas statute is entirely different from ours, which has been twice decided by the Supreme Court of California to be a mere statutory declaration of the common law, as we have shown in our opening brief, pages 29, 47 to 55.

> Railroad Co. v. Fort, 17 Wallace 553 (cited on page 10 of the supplemental brief of defendant in error),

was the case of a boy sixteen years of age who was engaged in a shop for the purpose of receiving and

putting away moldings. He had no experience whatever with machinery and was not supposed to work about it. He was ordered suddenly, by the superintendent of the shop, to leave his customary occupation and to ascend a high ladder and adjust a belt upon a machine moving at the rate of 175 to 200 revolutions per minute. It was held by the Supreme Court that the service which he was performing was outside of that which had been contracted for between the railroad and the father of the boy when he was placed to work; that it did not appear that the boy understood the nature or danger of his work, and therefore did not assume the risk.

Here the defendant in error was performing the very work which he had contracted to do. The "X" board and the roller were in the same position at the time he commenced work as they were at the time of the accident.

Gila Valley etc. Co. v. Hall, 232 U. S. 94 (U. S. Advanced Opinion 1913, 229, 231).

Plaintiff there was injured by being thrown from a handcar, owing to a defect in the flange of a wheel. The Supreme Court in holding the evidence sufficient to sustain a verdict in his favor, said:

"The motion for direction of a verdict seems to have been rested upon the additional ground that the alleged defect was so obvious that its existence must have been known to the plaintiff, and that he therefore assumed the risk. There was no direct evidence that he knew of the defect, and it does not appear to have

been a part of his duties to inspect the machine or the wheel, or to look after their condition. He had been employed for only three or four days in work that required him to ride upon the car, and at the utmost it was a question for the jury whether the defective condition of the wheel was so patent that he should be presumed to have known of it. * * *

"An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, *until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it.*"

> Smith v. Cook, 164 Fed. 268, 187 Fed. 538, 540 (cited in the supplemental brief of defendant in error on page 10),

is merely a discussion of conflicting evidence as to how an accident occurred.

Defendant in error, on page 10 of his supplemental brief, cites a number of California decisions to support the well recognized rule that an employee who is so lacking in age or experience as not to be able to appreciate the danger incident to known defects, does

not assume the risk thereof. As heretofore pointed out this rule has no application to the case at bar.

Foley v. Cal. Horseshoe Co., 115 Cal. 184, 194, was a case of a boy fourteen years of age injured by reason of a defective belt. He had called the attention of the foreman to this defective belt and the foreman had assured him that there was no danger and told him that the belt was all right, and that it could not cause any harm to him. Little argument, we believe, is necessary to demonstrate the difference between that case and the one we are considering. Here the plaintiff, seventeen years of age, man grown, and doing a man's work, was injured by an open and obvious piece of machinery, the danger of which was perfectly apparent to him. He made no complaint of it, and was not assured by anyone that it was safe. It was conceded at the oral argument that he had sufficient appreciation to assume the risk of injury from having his foot struck by the roller. Surely he must have known that if the roller would injure his foot if it struck it, that his foot also would be injured if caught and held against the roller.

> Pigeon v. Fuller, 156 Cal. 691, 697 (cited on page 16 of the supplemental brief of defendant in error).

Plaintiff in a lead factory was injured by the escaping fumes from melted lead. He knew of the escaping fumes, but did not know that they were poisonous.

Quinn v. Electric Laundry Co., 155 Cal. 500.

A girl, with no knowledge of or experience with machinery, was set to feeding sheets through a mangle. The guard to the mangle was defective and one of the rolls which contributed largely to her injury was concealed from her view. All of the witnesses in the case agreed that it required an expert to handle pieces as large as sheets, which must be fed in a certain special way, that if they were not fed in that way, the hand of an operator was likely to be drawn into the machine. It was admitted that plaintiff had received no instructions whatever as to how to feed these sheets to the mangle.

Petersen v. Cal. C. Mills Co., 20 Cal. App. 751.

Defendant in error requests that this case be considered with special care, and seems to place great weight upon the fact that a rehearing was denied by the Supreme Court of this state. The Supreme Court, however, has expressly declared that the denial of a rehearing of a cause decided by the Court of Appeal does not imply that the Supreme Court approves the law as announced by the appellate court.

See:

People v. Davis, 147 Cal. 346, 350;

Estate of Campbell, 12 Cal. App. 707, 724.

If this decision attempted to announce a rule different from that promulgated by the Supreme Court of the state or the federal courts, we assume it would not be followed. However, it does not do so. There

the plaintiff, a minor, without knowledge of or experience with machinery, was taken from his regular work and ordered to mount a ladder which leaned almost perpendicularly against a beam; there were no hooks or braces to hold it, but it did not appear that such fact was known to the boy; the ladder had been placed in position by his foreman only a moment before, he was directed to go upon it. The ladder slipping, he was precipitated against a fast revolving belt and injured. It was held that the question of his assumed risk was for the jury, the court saying, in addition to the quotation printed by defendant in error:

"These circumstances, briefly stated, are the complexity of the situation, the fact that plaintiff was a minor and presumably without the judgment of an adult, that he was ordered by his superior to do the work which was outside of and more hazardous than his usual employment, that he was expected to and did obey promptly and that he had a right to assume that the ladder was placed with due regard for his safety. In view of these incidents, we think it cannot be said as a matter of law that no other rational inference can be drawn than that plaintiff was guilty of contributory negligence." (Pp. 756-757.)

It seems to us that little argument is necessary to point out the distinction between that case and the one at bar. Here the plaintiff was not taken from his regular employment. While at the time of the accident, he had to work fast, he was not suddenly confronted with a danger seen for the first time. Ever since the push and carrying tables had been constructed, he had known

the purpose of the dog roller; known that it was revolving at a high speed and knew the "X" board was within an inch or two of the roller and that if his foot was caught between them it would be hurt. His injury was not due to any failure to appreciate the danger of getting his foot caught between the board and the roller, but solely in failing to carry out his intention to step clear of both of them.

Mansfield v. Eagle Box etc. Co., 136 Cal. 622.

Plaintiff, nineteen years of age, was injured by having his hand drawn against a buzz saw while he was sawing wood. He was unacquainted with machinery and had never worked about a buzz saw except one of an entirely different pattern for ten or fifteen minutes a day for four or five days. At the time of his injury he was pushing a board on the table under the saw, which was revolving downward. It was shown by the testimony that there were other ways in which the work should have been done, but he had received no instructions how to perform his work. It does not appear from the opinion what caused his hand to come in contact with the saw. The defense of assumed risk apparently was not raised, urged or decided, it merely being held that the question of negligence of the defendant, and of contributory negligence of the plaintiff should have been left to the jury.

Merrifield v. Maryland Mfg. Co., 143 Cal. 54;
Schellin v. No. Alaska Salmon Co., 167 Cal. 103,

were cited in the original brief and have been commented on.

Daubert v. Western Meat Co., 135 Cal. 144 (cited on page 10 of supplemental brief of defendant in error).

Plaintiff was working in a factory and was taken from his ordinary vocation and required to place a belt on overhead machinery, while the same was in rapid motion. He was killed while attempting to carry out these instructions by reason of set screws in a revolving shaft. It was claimed by the defendant that plaintiff assumed the risk of these set screws because he knew of them. The Supreme Court held, however, that the evidence did not show without dispute, that he knew of the set screws, saying:

"Here the work which deceased was doing at the time of his death was outside of and different from his regular work. This being so, if he did not know the character of the machinery and the danger surrounding the act of removing the belt, then he assumed no risk in attempting to carry out the orders of the foreman. There is some vague general evidence, upon the part of the foreman, that deceased knew of the situation of these set screws. This evidence in no sense is positive and direct to that effect. It is based upon inference and presumption; and in a case involving the principle here declared, it will not be held, as matter of law, that the injured party assumed the risk unless the evidence is clear, explicit, and uncontradicted to that point. * * * (P. 147.) His ordinary duties were performed some distance from the shaft, and had no connection whatever with it. The shaft was overhead, and therefore out of the ordinary

line of vision. It was in constant revolution during working hours, and, when revolving, the set screws could not be seen. While it is in evidence that deceased, under orders, requested the engineer at one time to fix the set screws, it is not at all apparent that he saw them at that time. It is also in evidence that set screws are ordinarily made flush with the coupling, thereby not protruding, and it does not follow that in conveying the order to the engineer he necessarily knew either the locality of the set screws or that they protruded." (P. 148.)

In the case at bar the evidence is clear, explicit and uncontradicted that the defendant in error knew of the roller, knew it was shod with sharp spikes, and also knew of the "X" board and its proximity to the roller. As to these facts there is no dispute; no room for different men to draw different conclusions, for the plaintiff many times testified to their existence. In fact, we have based all of our arguments upon the testimony of the defendant in error alone.

Jensen v. Will Finck Co., 150 Cal. 398.

Plaintiff, a boy of twelve and a half years of age, was employed as a cash boy in a department store. On the day of the accident he was sent to work in defendant's store room, his duty there being to push heavy trucks onto an elevator and then ride on the elevator to the top of the sidewalk and push the trucks down Farrell street to defendant's new store house. The side wheels of the truck were larger than the other wheels, so that the truck, when stationary, would tilt

to one end. It also had a tendency to move forward when at rest. On the first day of plaintiff's employment, after he had moved several truckloads in the manner described, he, and another small boy, undertook to move an especially heavy truck, the plaintiff pulling it and the other boy pushing it, upon the elevator. There were no sides to the elevator and when the truck was placed on it there were only a few inches between the sidewalk and where the plaintiff had to stand. After the elevator had been started upward, the truck moved forward slightly and forced the plaintiff's leg against the sidewalk, crushing it so that amputation was necessary. On cross-examination the plaintiff said that he was old enough to know and understand that if he got his foot beyond the elevator it would be hurt. The Supreme Court held that this was not sufficient to show that a boy of twelve and a half years of age appreciated the additional danger of the truck moving forward and thus injuring him, saying in part:

"This evidence, however, only proves that he knew if he projected his foot beyond the elevator he would get injured. It was not evidence that he knew and appreciated the fact that the truck he was taking up in the elevator might by reason of its size and construction or its position on the elevator list to the side and push his foot beyond the elevator floor. * * * It was one thing for him to have known that the truck would shift, but another thing to have sufficient judgment to apprehend any dangers from it. If from youth or inexperience, or both combined, he did not

appreciate the peril in which such shifting might place him, he is not deemed in law to have assumed the risk of injury so as to relieve the defendant from any liability in placing him there without warning. * * * (P. 407.)

"It is true that where a minor is shown to have known of the special dangers attending work to which he has been assigned, and has sufficient intelligence and judgment to appreciate them, the employer will not be held liable for any injury sustained by him during such work resulting from dangers which he knew and appreciated. Under such circumstances, as in the case of an adult, he will be held to have assumed the risk of injury." (P. 408.)

We submit that the evidence here unquestionably shows that the defendant in error did understand and appreciate the dangers of his position. There was nothing concealed or latent about it. There was no unusual motion of the machinery which caused his injury. There is not a scintilla of evidence to show that through youth or inexperience, the defendant in error did not fully appreciate and understand the very obvious danger of getting his foot between the board and the roller.

In connection with the rule announced in Jensen v. Will Fink Company, we again print the language of the Supreme Court of California in

Bresette v. E. B. & A. L. Stone Co., 162 Cal. 74, 79.

"In view of what has been shown as to the obviousness of the danger, it is also clear that the defendant was not guilty of negligence productive of injury in failing to instruct plaintiff as to such danger. There was nothing to tell him in this regard that he did not already know or must be presumed to have known. In this connection, the language of the Supreme Court of Massachusetts in Wilson v. Mass. Cotton Mills, 169 Mass. 67 (47 N. E. 506), is pertinent. The court said: 'The plaintiff's contention is that he was set to work on a dangerous machine without proper instructions. But it is difficult to see what the defendant's officers could have told him that he did not already know. It was apparent that the wheels were uncovered. They were certainly not bound to tell him that if he got his hand in the cogs he would be hurt. *This any child of ten would know.*'"

It was strenuously insisted at the oral argument and again reiterated in the supplemental brief, that plaintiff in error should have warned defendant in error of the danger of getting his foot caught between the roller and the "X" board, but as remarked from the bench at the time of the oral argument, there was nothing which the employer could have told defendant in error that his own eyes did not tell him. The language of the Supreme Court in the Bresette case is peculiarly appropriate.

Again, as we have often remarked, the misfortune of the defendant in error was not through failing to appreciate the danger of getting his foot between the roller and the board, but was caused entirely by his

failure to execute his intention of stepping over both the board and the roller. If he had been warned a hundred times of the danger, such warning would not have prevented his misstep.

Because of the length to which this brief has been extended, we do not believe it necessary to comment in detail on the numerous decisions cited from the courts of sister states. We have examined all of them, and all are plainly distinguishable from the case at bar. In most of them the evidence does not show, without dispute, that the plaintiff knew of the defect which produced his injury. In the few cases cited where the defect was known, the danger incident thereto either was not known and was not obvious.

> Tuckett v. American Steam etc. Laundry, 84 Pac. (Utah) 500 (cited on page 11 of the supplemental brief of defendant in error),

is illustrative of the rest, and as it is one of the strongest in favor of defendant in error we will notice it.

Plaintiff was injured while working about a mangle. She had worked about mangles of different patterns for a number of months, but had no special knowledge of or experience with machinery. She observed that a certain board that ran through the mangle did so with a jerky motion, and was not returned automatically as quickly as it should have been. She called this to the attention of the superintendent, who assured her there was nothing the matter with the machine, that it would adjust itself in a little while, and that, until it did so, to keep her hand upon the board,

thus steadying it. While she was doing the work as directed, the board started forward suddenly, and more rapidly than usual, and thus drew her hand into the rolls. It was held that it could not be said, as a matter of law, that she assumed the risk of this injury; that it did not clearly appear that she had sufficient knowledge of machinery to appreciate the fact that the jerky motion of the machine would indicate that it would suddenly and unexpectedly start in an unusual manner. The rule of law stated in Railroad v. McDade, *supra*, was adopted, viz., that a servant does not assume risks of defects unless he knows of them and appreciates the danger incident thereto; that where a defect is either known to a servant or open and obvious, he assumes the risk if he continues to work with it, without making complaint. The Utah court pointed out that these rules are recognized by all authorities, the only dispute being as to their application to each case, saying (at pages 506 and 507):

"As has already been said, however, the applicability of the principle depends on the precise circumstances of each case. An attempt, even if possible, therefore, to distinguish all those cases from that at bar, would be unprofitable. But inasmuch as counsel rely particularly upon the case of Kupkofski v. Spiegel (Mich.), 97 N. W. 48, and inasmuch as the facts in that case are more similar to those in the case at bar than most of the cases cited by counsel, we deem it right to consider that case somewhat in detail and by way of comparison. In that case plaintiff sued to recover damages for personal injuries received by her

while operating a shirt-bosom ironer in defendant's laundry. The ground of negligence relied on was that the defendant allowed the machine, which was apparently the same as that in question here, to become out of repair. The testimony introduced on behalf of the plaintiff showed that she was 17 years old, and had worked at the machine about two weeks, when the belt which furnished the power to the machine became loose and caused it to run with a jerky motion. With the machine running in this fashion, and while the plaintiff was holding the shirt on the ironing table or board, about six inches away from the roller, the table or board stopped and then started with a jerk, drawing plaintiff's hand under the roller. The trial court directed a verdict for the defendant, and on appeal the judgment was affirmed on the ground that the plaintiff assumed the risk, and was also guilty of contributory negligence. It will be noticed at once that, so far as the question of assumed risk is concerned, there is an all-important difference between the facts in the Michigan case and in the case at bar. In the former case the plaintiff observed the precise defect that caused the injury. She knew that the belt was loose, and that, when the friction became unusual, the machine would slow down, and, as the belt moved again to perform its office, the machine would start up again, so that she knew exactly what to expect when the machine stopped. On the contrary, in the case at bar the plaintiff only knew that the machine ran in a jerky, unsteady fashion. There was no defect apparent to her, like a loose belt, which indicated in any

manner that the machine would, at any time, run faster than ever before. In the former case the court could well say that the plaintiff should have realized the danger, that she was not ignorant of it, whereas in the present case it is impossible for the court to so say."

Assume that, as the defendant in error was stepping over the dog roller he had been injured, not by his foot slipping between it and the "X" board, but by the dog roller jumping a few inches from its bearings; that this unusual motion of the roller had been due to the looseness or absence of some bolt; that the defendant in error had known of the absence of the bolt but had not known that the absence or looseness of the bolt would allow the roller to jump from it bearings. In such case it could not be held that he assumed the risk of his injury, although he knew of the defect. But he was not so injured. His misfortune was not caused by any unusual motion of the machine, but by getting his foot accidently caught between the board and the roller. Any child of ten would know that such an accident would have produced serious injury.

Defendant in error repeats the argument advanced in his original brief, that the amendment of 1970 worked some change in the common law rule of assumed risk. As before noted, by citations on page 29 of our opening brief, the Supreme Court of California has twice held to the contrary. A reading of the cases cited by us on page 29 of our brief, of the decisions rendered prior to the amendment, show that the law always has been construed by the Supreme Court of this state exactly as it was declared by the amendment.

In addition to these decisions,

> Schellin v. North Alaska Salmon Co., 167 Cal. 103 (cited by defendant in error on page ... of his brief, and page 10 of his supplemental brief),

applied the same rule to a case arising subsequent to 1907, as had been in force prior thereto.

The amendment of 1907 did not primarily deal with the assumption of risk or of contributory negligence, but was intended to modify the defense of negligence of a fellow-servant by incorporating thereon what is known as the department rule. But whether we are correct in our construction of this statute or not, the statute by clear and explicit terms imposed upon the servant the assumption of risk arising from defective places of work where the servant knew of the defect and fully appreciated the danger incident thereto.

While the statute required an employee to have full knowledge and comprehension of the danger, it cannot be assumed that it was ever intended that he should escape the assumption of risk by wilfully refusing to see that which was plainly visible to him. Indeed, counsel, on page 3 of the supplemental brief of defendant in error, state:

"We do not mean to say that such actual understanding, comprehension and appreciation may not in exceptional and extreme cases appear to an appellate court to be so clear and positive upon the whole evidence, notwithstanding even the denial of the plaintiff that it will hold that the court below and not the jury should have decided that question of fact. This is

what we understand is meant by the phrase that in such a case it becomes a question of law."

If the present case does not present such an exceptional case and one free from doubt, we are unable to comprehend how such a case could be presented. The defendant in error, man grown, and doing a man's work, a student of machinery, was injured by getting his foot caught between the board and the roller. He was fully aware of the existence of both.

We again take the liberty of calling the court's attention to the testimony of defendant in error, set out more fully on pages 42 and 43 of our opening brief:

"I knew that roller was revolving. As near as I can remember, the roller made about a hundred revolutions a minute. * * *

"I suppose I knew it. Most likely I knew if I got my foot in there it would be injured. I don't see how you can expect me to state that I knew if I got my foot in there I would be badly injured, at least would be injured, when I never gave it a thought at the time. I suppose I ought to know it if that is what you mean. I knew the board X in the model was there. I never attempted to put my foot on that board by stepping on the carrying table on the board and then over." [Trans. pp. 150-151.]

"Q. You appreciated if you put your hand in that revolving dog roller, it would get torn and get hurt, did you not? A. I never gave any thought to that either. If I had thought, most likely I would have known it. I never had any occasion to think of it." [Trans. pp. 156-157.]

If the plaintiff had scalded his hand by placing it in water which he knew to be boiling, or had burned it by coming in contact with fire, the existence of which he knew, could he escape the assumption of risk by stating that he did not stop to think that boiling water would scald, or fire burn? Obviously not.

It is apparent from defendant in error's own testimony that, even if the "X" board had not been present, his foot would have come in contact with the roller and been injured.

"I was in the act of stepping over there and the next thing I knew my foot was caught (by the roller) and pulled in between the roller and the board and the roller coming down chewed up my foot." [Trans. of Rec., page 148.] "I can't say whether my foot caught in there as I went up or whether I stepped clear up and my foot slipped back in again." [Trans. of Rec., page 149.]

Injury must have resulted regardless of the existence of the "X" board, but no one can determine its extent. The risk of such injury, whatever it might have been, counsel for defendant in error admits was assumed.

It is perfectly apparent that if the defendant in error did not fully appreciate the danger incident to stepping over the roller, such lack of appreciation was due entirely to his failure to give any care, attention or thought to dangers which stared him in the face. If such is the case he exposed himself to a danger, without understanding it, as a result of his own lack of care and attention, and is therefore convicted of con-

tributory negligence. We have urged this in our opening brief and have received no reply and can conceive of none.

We feel that possibly these supplemental briefs, instead of aiding the court, have added to its labors. After all, the numerous decisions cited by both parties announce but one rule, viz., that where it is a debatable proposition either that the injured servant knew of the defects or that if he knew of them that he appreciated the dangers incident thereto, then it is the province of the jury, the triers of fact, to determine such debatable question. If, on the other hand, it is not debatable, and it clearly appears without dispute that the defect and dangers incident thereto were known to the servant, or so open and obvious that if he exercised ordinary care in doing his work he must have known and appreciated them, then, as a matter of law he is held to have assumed the risk of his injury, and there is no question to be submitted to the jury. No decision cited by either party announces any different rule. It is then, after all, a question of the application of these settled and undisputed rules to the facts embodied in this record. We believe that those facts show beyond cavil that the position of the roller and the "X" board were known to the defendant in error and that the danger of getting any part of his person between them was obvious and was fully apparent to, and appreciated by him. That being so, the statute in force at the time of the accident forbids a recovery.

The question of the contributory negligence of the defendant in error and also the questions presented by the instructions given and refused, we submit on the argument already made and the briefs on file.

Respectfully submitted,

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